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LENSCRAFTERS, INC. and EYEXAM OF  
8 CALIFORNIA, INC.

9  
10 IN THE UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 LENCRAFTERS, INC. and EYEXAM OF  
CALIFORNIA, INC.,

13  
14 Plaintiffs,

15 v.

16 LIBERTY MUTUAL FIRE INSURANCE  
COMPANY; EXECUTIVE RISK SPECIALTY  
17 INSURANCE COMPANY; UNITED STATES  
FIRE INSURANCE COMPANY; MARKEL  
18 AMERICAN INSURANCE COMPANY and  
WESTCHESTER FIRE INSURANCE COMPANY,

19  
20 Defendants,

21 AND RELATED COUNTER- AND CROSS-  
22 CLAIMS.

Case No.: C-07-2853 SBA

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION TO DISMISS  
WITHOUT PREJUDICE CLAIMS  
AGAINST DEFENDANTS LIBERTY  
MUTUAL FIRE INSURANCE  
COMPANY, EXECUTIVE RISK  
SPECIALTY INSURANCE COMPANY  
AND WESTCHESTER FIRE  
INSURANCE COMPANY**

Date: April 8, 2008

Time: 1:00 p.m.

Courtroom: 3

The Hon. Sandra Brown Armstrong

**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on April 8, 2008, at 1:00 p.m., in Courtroom 3 of the United States District Court, Northern District of California, located at 1301 Clay Street, 3rd Floor, Oakland, California, plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. will and do move pursuant to Fed. Rule Civ. Pro. Rule 41(a)(2) to dismiss without prejudice claims plaintiffs have filed against defendants Liberty Mutual Fire Insurance Company (“Liberty”), Executive Risk Specialty Insurance Company (“ERSIC”) and Westchester Fire Insurance Company (“Westchester”). This motion is made on the grounds that plaintiffs have entered into settlement agreements with Liberty, ERSIC and Westchester pursuant to which these defendants have consented to and contributed funds to a settlement in the underlying *Snow* action, and the parties released claims against one another. The motion is based on the memorandum of points and authorities filed herewith, the Declaration of Celia M. Jackson accompanying this motion, the pleadings and papers in this action, and on any argument to be made at the hearing.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Pursuant to Federal Rule of Civil Procedure 41(a)(2), plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. (together, “LensCrafters”) respectfully request that the Court enter an order dismissing without prejudice LensCrafters’ claims against defendants Liberty Mutual Fire Insurance Company (“Liberty”), Executive Risk Specialty Insurance Company (“ERSIC”) and Westchester Fire Insurance Company (“Westchester”). As described below, LensCrafters has reached a settlement with these defendants pursuant to which they consented to and contributed funds to a settlement in the underlying *Snow* action, and the parties released claims against one another. LensCrafters also agreed to file a dismissal of all claims against Liberty, ERSIC and Westchester.

This motion has been made necessary because defendant Markel American Insurance Company (“Markel”) has not responded to LensCrafters’ repeated requests that it sign a straightforward stipulation permitting LensCrafters to dismiss its claims against the settling insurers. Declaration of Celia M. Jackson, filed herewith, ¶ 6. Thus, in order to meet its

obligations under the settlement agreements, and in the interests of moving this case forward, LensCrafters requests that the Court grant LensCrafters' motion and enter the requested dismissal.

## **II. STATEMENT OF FACTS**

### **A. The *Snow* Settlement**

This lawsuit involves a dispute between LensCrafters and defendant insurers regarding indemnity coverage for a class action lawsuit entitled *Melvin Gene Snow, et al. v. LensCrafters, Inc., et al.*, San Francisco Superior Court Case No. CGC-02-40554 ("*Snow*"). The *Snow* action has been pending for nearly six years. After a year of intensive negotiations, however, including multiple mediation sessions with the Hon. Edward A. Infante (Ret.) and the Hon. Ronald M. Sabraw (Ret.), the parties in *Snow* were able to achieve a settlement. The settlement agreement covers a class of more than one million consumers and will provide a combination of cash and discount vouchers to class members. *See* Jackson Dec., ¶ 2.

The parties presented the *Snow* settlement to the Hon. Richard A Kramer, who is presiding over the *Snow* case, on February 4, 2008. On that date, the court granted preliminary approval of the *Snow* settlement. The final approval hearing is scheduled for July 11, 2008. *See* Jackson Dec., ¶ 3.

### **B. LensCrafters' Settlements with Liberty, ERSIC and Westchester**

As part of the settlement negotiations with the *Snow* plaintiffs, LensCrafters reached settlement agreements with three of its insurers: Liberty, ERSIC and Westchester. These insurers consented to the *Snow* settlement and each insurer agreed to provide funding for the settlement. Liberty and ERSIC's contributions have exhausted their policy limits. Jackson Dec., ¶ 4. Defendants Markel and United States Fire Insurance Company refused to participate in the settlement. *Id.*

The settlement agreements between LensCrafters and the settling insurers contain mutual releases. LensCrafters has also agreed to file dismissals without prejudice of its claims against these insurers immediately upon preliminary approval of the *Snow* settlement. These dismissals will become with prejudice if and when the *Snow* settlement receives final approval. Jackson Dec., ¶ 5.

**C. Markel Ignores LensCrafters' Request To Stipulate to the Dismissal of LensCrafters' Claims Against the Settling Insurers**

On February 15, 2008, as required by Fed. Rule Civ. Pro. Rule 41(a)(1), LensCrafters circulated to the other parties a draft of a stipulation to dismiss its claims against Liberty, ERSIC and Westchester. After negotiations over the language of the stipulation, all defendants other than Markel agreed to execute the stipulation. Despite repeated attempts to obtain Markel's consent to the stipulation, however, Markel has not provided it. Jackson Dec., ¶ 6. Markel's failure to consent to the stipulation is inexplicable. Thus, to comply with its obligations under the settlement agreements and in the interests of moving this case forward, LensCrafters asks the Court to enter an order effectuating the dismissals.

**III. CONCLUSION**

For the reasons stated above, the Court should grant LensCrafters' motion to dismiss without prejudice the claims against Liberty, ERSIC and Westchester.

DATED: February 26, 2008

Respectfully submitted,

HELLER EHRMAN LLP

By /s/ Celia M. Jackson  
Celia M. Jackson

Attorneys for Plaintiffs  
LENSCRAFTERS, INC. and EYEXAM OF  
CALIFORNIA, INC.